

PRELIMINARY ENGINEERING AGREEMENT

This Preliminary Engineering Agreement ("**Agreement**") dated as of the ____ day of _____, 2010 is between BNSF RAILWAY COMPANY ("BNSF") and the CALIFORNIA HIGH SPEED RAIL AUTHORITY ("**CHSRA**").

A. CHSRA is a political subdivision of the State of California created to construct and implement a high speed passenger rail system serving California. CHSRA may be interested in the future in acquiring real property interests within BNSF's rights of way between Madeira and Bakersfield (the "**San Joaquin Corridor**") and between Los Angeles Union Station and Fullerton Station (the "**Los Angeles Corridor**") to construct and operate portions of such system.

B. BNSF plays an important role in interstate commerce and in maintaining the State of California's competitiveness and quality of life by providing freight transportation and goods movement as well as Amtrak passenger service.

C. BNSF and CHSRA wish to protect freight, intercity and commuter passenger rail mobility and capacity in the San Joaquin Corridor and Los Angeles Corridor by assuring that CHSRA's consideration of potential use of portions of such corridors for the HST system occurs in a manner that would not jeopardize such freight and intercity passenger service.

D. CHSRA has the ability, under California law, to initiate and exercise eminent domain and has informed BNSF that it would initiate the eminent domain process if the parties are not able to reach mutually acceptable agreements accomplishing the foregoing in lieu of the threatened condemnation or similar proceeding.

E. BNSF and CHSRA do not yet know whether it is possible to locate such system on the Corridors (including, but not limited to, the construction, operation, maintenance and repair of such system) (the "**Proposed Project**") in such as a manner to accomplish the foregoing (i.e., whether the Proposed Project is feasible) and recognize that additional work is necessary to make such determination.

The purpose of this Agreement is to provide funding for BNSF to perform preliminary design review and associated tasks in furtherance of determining the feasibility of the Proposed Project.

ARTICLE I

1.1 **Term.** The term of this Agreement (the "**Term**") shall begin upon the date both BNSF and CHSRA have executed and delivered this Agreement and shall expire:

- a. Upon the date both parties agree in writing to terminate this Agreement; or
- b. After **June 30, 2011**, upon the date either party delivers written notice to the other that it wishes to terminate this Agreement; or
- c. Upon the date the parties enter into the Definitive Agreements.

No termination or expiration of the Term of this Agreement will relieve CHSRA from obligations to reimburse BNSF for costs associated with Work (defined below) performed prior to the expiration or termination of the Term.

1.2 **Due Diligence.** Any inspections of the Corridor by CHSRA shall be subject to CHSRA and BNSF entering into separate agreements setting forth the terms and conditions with respect to such inspections or entry onto the Corridors.

1.3 Planning Assistance. In order to assist CHSRA in planning for the Proposed Project including determining whether it is feasible as described above, BNSF will use commercially reasonable efforts to perform the following related to preliminary engineering (the **'Work'**):

- a. As CHSRA provides design drawings to BNSF for comments, BNSF will provide comments to CHSRA limited to initial identification of mitigation that may be necessary to allow BNSF to provide freight service without adverse impact and provide for future growth in its freight operation while also providing for intercity and commuter conventional speed passenger operations, concurrent with use of a portion of the Corridor(s) to accommodate the Proposed Project. Such comments are intended to address impacts in three areas: (1) Mainline freight and conventional speed passenger operations, including the provision of BNSF maintenance roads where required; (2) freight yard and terminal operations; and (3) freight customer facilities and passenger stations.
- b. BNSF will review such design drawings to initially identify and describe locations where the ability to serve future freight customers could be adversely impacted by proposed CHSRA rail lines or other improvements unless some accommodation is made now or in the future. BNSF will offer proposals for location specific and generic solutions to all locations (current or anticipated) of such possible conflict. In reviewing such drawings, BNSF will take into account the possible location of fiber optic cabling that would facilitate the construction and operation of signaling systems on both the BNSF and the CHSRA mainlines.
- c. BNSF will assist in the design of track, signal, and station improvements where joint CHSRA and conventional speed passenger services will call at the same stations to accommodate the transfer of passengers from one service to the other.
- d. BNSF will assist in the design of track and signal connections where conventional speed passenger trains could enter or exit BNSF track and operate over CHSRA track.
- e. [My notes are unclear whether this task was to be re-inserted or not]
- f. BNSF will work with CHSRA to develop a joint plan that could describe what could be done with each public and private crossing (highway or other) of the current BNSF right-of-way and thereafter, which organization (i.e., BNSF or the CHSRA) would be responsible for ongoing maintenance and capital replacement.
- g. BNSF will work with CHSRA to develop a construction phasing theory to assure continued freight and conventional passenger rail operation when construction of CHSRA improvements were to begin.
- h. BNSF will identify potential capital improvements and possible changes in operating procedures, including cost estimates for the purchase, installation, operation and/or maintenance and replacement of same, that could be placed, at the sole discretion of the CHSRA, into their Product Safety Plan or their System Safety Program Plan and ultimately funded as part of the Proposed Project.
- i. All work done shall be the subject of task orders approved by the CHSRA and BNSF in writing which shall specify the nature and scope of the work to be done, the location subject to the work, schedule for the work, and the agreed cost of the work covered by such task order. Execution of task orders shall be considered CHSRA's notice to proceed with the work contemplated in the task order and certification that it has funds committed to pay the agreed cost set forth in the task order.

1.4 Reimbursement. CHSRA shall reimburse BNSF for costs associated with the Work. Because of the preliminary nature of the Proposed Project the parties acknowledge that the precise nature and extent, and therefore cost, of the Work is not known. CHSRA's obligation to reimburse BNSF for costs associated with the Work shall not exceed in the aggregate ____ [CHSRA to Suggest Amount] _____ (the "**Maximum Reimbursement**") and BNSF shall not be required to perform any Work to the extent the cost of such Work exceeds in the aggregate the Maximum Reimbursement. CHSRA shall, pursuant to this Agreement, budget sufficient funds in 2010-2011 to pay up to the Maximum Reimbursement. If at any time during the performance of the Work, it reasonably appears to BNSF that there will not be sufficient remaining aggregate funds available to complete the Work, BNSF shall so advise CHSRA and the parties shall then confer on whether to modify the scope of the Work, attempt to obtain additional funds and amend the Maximum Reimbursement, or otherwise address the issue. After a task order is signed by both parties, BNSF shall send CHSRA invoices ("**BNSF Invoices**") monthly describing the amount to be paid by CHSRA to BNSF associated with the Work for all task orders for which Work is ongoing, together with such back-up documentation as CHSRA may reasonably request to verify the requested payment amounts. Payment from CHSRA shall be due within thirty (30) calendar days of receipt of a BNSF Invoice. BNSF shall provide contractor invoices, employee timesheets, and other records of cost and expenses as back-up. CHSRA shall pay the amounts set forth in the BNSF Invoices within 30 days of receipt unless CHSRA disputes amounts set forth in the BNSF Invoice in which case CHSRA may withhold the amount disputed until the parties resolve such dispute and BNSF may suspend its Work until such dispute is resolved. BNSF Invoices will be delivered via _____ to _____. Payments by CHSRA shall be delivered via _____ to _____.

1.5 Consultants. BNSF shall provide in house staff to perform the Work or shall select one or more engineering or other professional firm ("**Engineering Firm**") for performance of some or all of the Work. In the event in house staff performs the Work, such staff time shall be billed at the hourly rate customarily paid to such employees and if an employee is paid a salary, the hourly rate used as a basis for the employee's salary shall be the hourly rate charged to CHSRA plus applicable additives. Agreements with Engineering Firms performing portions of the Work shall contain a not-to-exceed price, subject to adjustments as required and as agreed to in advance by the BNSF and the Engineering Firm. CHSRA acknowledges that the Engineering Firm(s) may retain sub-consultants to prepare studies, surveys and reports as part of the Work. CHSRA shall not be a party to any agreements with any of the Engineering Firms or their sub-consultants and shall have no liability arising from any such agreements. CHSRA's obligation to reimburse costs of the Work shall accrue only to BNSF, it being understood and agreed that such obligation arises solely from this Agreement and not from any agreements between BNSF and Engineering Firms.

1.6 Indemnification. BNSF agrees to indemnify, defend and save harmless CHSRA, its officers, agents and employees from any and all claims made against CHSRA or its officers, agents and employees by any and all contractors, subcontractors, suppliers, laborers, and any other person, firm or corporation furnishing or supplying work services, materials, or supplies in connection with the performance of this Agreement (collectively, "Subcontractors"), and from any and all claims for personal injury or property damage arising from the performance of this Agreement except to the extent such personal injury or property damage was caused or alleged to have been caused by the negligence or willful misconduct of CHSRA or its officers, agents or employees.

1.7 Funding Requirements. Some or all of the funds used by CHSRA to reimburse BNSF come from the following grants _____ (collectively, the "**Grants**"). Except to the extent set forth in Exhibit A to this Agreement, the parties agree that no provisions of the Grants apply to BNSF or any Engineering Firm or sub-consultant. CHSRA shall indemnify, defend and hold BNSF harmless from and against any costs, damages, fines or penalties incurred by BNSF associated with any failure to comply with any other requirements set forth in the

Grants or any claims by anyone that other requirements set forth in the Grants apply to BNSF or any Engineering Firm or their sub-consultants.

1.8 Nature of BNSF Work. Any comments, approvals, assistance or other efforts by BNSF as part of the Work shall in no way obligate BNSF in any manner with respect to the design of the Proposed Project or an indication that BNSF agrees that ultimately the Proposed Project would be feasible as described above. Such comments, approvals, assistance or other efforts shall not be deemed to be an affirmation that any plans and specifications, construction, operation or other matter related to the Proposed Project is structurally sound or appropriate or that any plans and specifications, construction, operation or other matter meets applicable regulations, laws, statutes or local ordinances and/or building codes. CHSRA shall be solely responsible for determining whether the plans and specifications, construction, maintenance, operation and repair of the system contemplated in the Proposed Project meet its needs and will provide for safe operation of its proposed passenger operations.

1.9 Notices. Except as otherwise expressly provided in this Agreement, all requests, notices, demands, authorizations, directions, consents, waivers or other communications required or permitted under this Agreement shall be in writing and shall either be: (i) delivered in person, (ii) deposited postage prepaid in the certified mails of the United States, return receipt requested, (iii) delivered by a nationally recognized overnight or same-day courier service that obtains receipts, or (iv) delivered via facsimile, with confirmation of receipt by telephone, with an original deposited postage prepaid in the first class mails of the United States, addressed:

If to BNSF: BNSF Railway Company
2500 Lou Menk Drive
Fort Worth, Texas 76131-2828
ATTN: Vice President & General Counsel – Regulatory
Facsimile No: _____

with a copy to:

BNSF Railway Company
2600 Lou Menk Drive
Fort Worth, Texas 76161-0034
ATTN: Assistant Vice President Passenger Services
Facsimile No: _____

with a copy to:

BNSF Railway Company
2600 Lou Menk Drive
Fort Worth, Texas 76161-0034
ATTN: Assistant Vice President Engineering Services
Facsimile No: _____

If to CHSRA: _____

Facsimile No: _____

with a copy to:

Facsimile No: _____

with a copy to:

Facsimile No: _____

1.11 Confidentiality. All information provided by BNSF to CHSRA in connection with the Proposed Project or obtained by CHSRA as a result of the inspections permitted by Section 2.3 (if any) or the Work performed by BNSF shall be subject to the terms of that certain Confidentiality Agreement between BNSF and CHSRA dated as of _____.

1.12 Assignment. Neither this Agreement nor any of the rights, interests, or obligations hereunder may be assigned by CHSRA without the prior written consent of BNSF which consent may be withheld in its sole discretion.

1.13 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which, when taken together, shall be deemed to constitute one and the same instrument.

1.14 Future Transactions and Agreements. CHSRA and BNSF mutually confirm their willingness to continue discussions concerning the Proposed Project including its feasibility and basic concepts they contemplate would be included in potential Definitive Agreements. A binding commitment with respect to the Proposed Project shall result only from the parties entering into Definitive Agreements and nothing in this Agreement including, but not limited to, the performance of the Work or reimbursement of costs by CHSRA as contemplated herein obligates either BNSF or CHSRA to enter into the Definitive Agreements.

[Remainder of Page Intentionally Left Blank]

BNSF and CHSRA have executed this Preliminary Engineering Agreement as of the date and year first written above.

BNSF RAILWAY COMPANY

By: _____
Name:
Title:

CALIFORNIA HIGH SPEED RAIL AUTHORITY

By: _____
Name:
Title:

Exhibit A

Grant Requirements Applicable to BNSF